

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1169

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- v -

EUGENE WELCOME and DORIS ELAINE
MILLER,

Appellants.

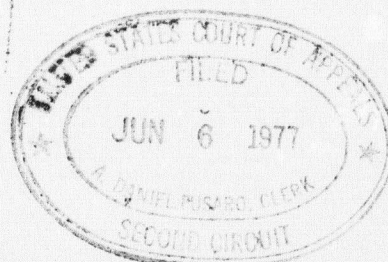
Docket No. 77-1169

JOINT APPENDIX TO BRIEFS
FOR APPELLANTS

Appeal From A Judgment
Of Conviction In The
United States District
Court For The Eastern
District Of New York

Gary Sunden, Esq.
401 Broadway
New York, N.Y. 10013
Attorney for Appellant
Eugene Welcome

Dominick L. DiCarlo Esq.
66 Court Street
Brooklyn, New York 11201
Attorney for Appellant
Doris Elaine Miller



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>Page</u>
Docket Entries	A1
Indictment	A6
Charge of the Court	A10
Hodges' Testimony	A65



IN OFFENSE MO

DEMEANOR MIS

FELONY Fel X

JUDGE/MAGISTRATE Assigned

0711

D. 207.1

Disp./Sentence

U.S.

vs.

EUGENE WELCOME

(LAST FIRST MIDDLE)

76 CR 449

Case Filed
Mo Day

7-13

JUVENILE

Docket Entries Al

BARTELS, J.

U.S. MAG
CASE NO

RELEASE

☐ Denied ☐ AMT ☐ Fugitive
☐ Set ☐ Pers Recog
☐ PSA☐ Date ☐ 10% Deposit
☐ Bail Not Made ☐ Surety Bond
☐ Status Changed (See Docket) ☐ Collateral
☐ 3rd ☐ Other

U.S. TITLE/SECTION

OFFENSES CHARGED

ORIGINAL COUNTS →

18:2, 371, 1202 Did conspire to Bank Robbery
(a)(1), 1202(c) with possession of a
(3), 2113(a) Dangerous weapon; was previously
2113(c)2113(d) convicted of a felony in a
Court of NY.

5

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Rec'd 7/19/76 Summons Served First Appearance	High Risk Date 7/13/76 Indict. Waived In Charging District Superseding Indict/Info	7/22/76 Final Plea X NG Final Plea	10/5/76 10/14/76 Verdict	2/10/76 On All Charges On Lesser Offenses WOP. IWP On Government Motion

Search Warrant	DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME
Issued Return Summons Issued Served Arrest Warrant Issued COMPLAINT OFFENSE (In Complaint)			PRELIMINARY EXAMINATION OR REMOVAL HEARING Date Scheduled Date Held Tape Number		☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.

Richard Appleby, AUSA

ATTORNEYS

Daniel Crupain

401 Broadway

New York NY 220 0942

* Show last names and suffix numbers of other defendants on same indictment/information

DEWITT OWENS 2; DORIS ELIANE MILLER 3;

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
7/13/76		Before DDOLING, J. - Indictment filed.	
7/22/76		Notice of Readiness for trial filed.	
7/23/76		Notice of Appearance filed.	
7/23/76		Before BARTELS, J. - Case called. Deft & Counsel present. Deft arraigned & enters a plea of not guilty. Deft waives speedy trial. Case adjd to 7/27/76 at 10:00 a.m. for bail hearing. Case adjd to 10/5/76 for trial.	
7/30/76		Waiver of speedy trial filed and sent to Chambers.	
10/5/76		Before BARTELS, J. - Case called. Deft & Counsel present. Defts motion for severance motion argued, motion denied. Trial ordered and begun. Jurors selected and sworn. Trial continued to 10/6/76.	7/23/76 T 10/5/76
10/6/76		Before BARTELS, J. - Case called. Deft & Counsel present. Trial resumed. Defts motion for mistrial - motion denied. Trial contd to 10/7/76.	

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY				Excludable Delay U.S.C.
			Interval Section (a)	Start Date End Date (b)	Cr. Code (c)	Total Days (d)	
10/7/76	Before BARTELS, J. - Case called. Deft & Counsel present. Trial resumed. Trial continued to 10/12/76.						A. Excludable Delay U.S.C.
10-12-76	Before BARTELS, J - case called - deft & counsel present - trial resumed - Govt rests - defts motion for judgment of acquittal - motion denied - trial contd to Oct. 13, 1976						B. NAR nation U.S.C.
10-13-76	Before BARTELS, J - case called - deft & atty present - trial resumed - Identification hearing ordered and begun - hearing concluded - Govt rests - deft rests - trial contd to Oct. 14, 1976						C. State Trans char.
10-14-76	Before BARTELS, J - case called - trial resumed - deft sums up - Govt sums up Jury retires to deliberate at 2:30 PM - Jury returns at 6 PM to hear testimony read back - Jury returns at 8:05 PM and renders a verdict of guilty on counts 2 and 3 Jury discharged - trial concluded - sentence adjd without date -						D. Inter Appl
10-14-76	By BARTELS, J. - Order of sustenance filed. (lunch)						E. Hour prot
10-14-76	By BARTELS, J. - Order of sustenance filed. (dinner)						F. Tran outie (per Rule & 4c)
10-14-76	By BARTELS, J. - Order of sustenance filed. (coffee)						G. Del tion and mar up 1 is e per 316
10-14-76	By BARTELS, J. - Order of transportation filed.						H. Mis Pro Ppt Pen tion tion Exp
11-8-76	2 envelopes filed received from Chambers ordered sealed by the Court (dated Oct. 6, 1976 and Oct. 7, 1976 respectively)						I. Pro ten mu me
12-10-76	Before Bartels, J. - Case Called. Deft. & Counsel present. Deft. sentenced for a period of 20 years on count 2, and 20 years on count 3, to run concurrently with each other for a total of 20 years imprisonment. Deft. advised of right to appeal.						M. Uns of or sub
12-10-76	Judgement and Commitment filed. Certified Copies to Marshal and Probation.						N. Per tal inc of sla
12-17/76	Notice of Appeal filed.						O. Per NA mit Tr
12-17/76	Docket entries and duplicate of Notice of Appeal mailed to the C of A.						P. Su un an on
12-21-76	Certified Copy of Judgment and Commitment returned and filed from Marshal. Deft. delivered on 6-19-76 to M.C.C.						R. De as of de se de
1-3-77	Stenographer's Transcript dated October 14, 1976 filed.						T. Cr G 31 (L) ju ph O le (M)
							U. Th 9 8 8
							W. G 18 31

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

APPEAL 0711 FELONY Fee X 207.1	JUDGE/MAGISTRATE Assigned U.S. vs. X Disp./Sentence	Docket Entries A 3 76 449 Docket No. 3 DORIS ELAINE MILLER (LAST, FIRST, MIDDLE)	Case Filed 7 13 No. of Days 2 JUVENILE
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U.S. TITLE/SECTION 18:2, 371, 1202(a)(1) Did conspire to 1202(c)(3), 2113(a) Bank Robbery with 2113(c) 2113(d) possession of a Dangerous weapon.	OFFENSES CHARGED 5	ORIGINAL COUNTS 76 449
II. KEY DATES & INTERVALS		
ARREST or U.S. Custody Began Summons Served First Appearance	INDICTMENT X High Risk Date Indict. Waived In Charging District	ARRAIGNMENT Information 7/13/76 Trial Set For 7/16/76 Trial Date 10/5/76 Trial Filed 10/14/76
TRIAL Sentence		

U.S. ATTORNEY OR ASST.	DATE	INITIAL/NO.	MAGISTRATE	INITIAL/NO.	OUTCOME
Search Warrant Issued Return Summons Issued Served Arrest Warrant Issued COMPLAINT OFFENSE (In Complaint)			INITIAL APPEARANCE DATE PRELIMINARY EXAMINATION REMOVAL HEARING WAIVED NOT WAIVED INTERVENING INDICTMENT		DISMISSED HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.

ATTORNEYS

Defense **X** CJA ☐ Ret. ☐ Waived ☐ Set ☐ None ☐ Other ☐ Prit ☐ UCD

Richard Appleby, AUSA

Dominick Di Carlo
66 Court St., Bklyn, NY
875-4318

DATE	DOCUMENT NO.	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
7/13/76		Before DOOLING, J. Indictment filed. Bench Warrant ordered.	
7-15-76		Bench Warrant Issued	
7/16/76		Before BARTELS, J. - Case called. Deft & Counsel present. Deft enters a plea of not guilty. Bail set at \$15,000 cash or surety. Case adjd to 7/23/76 at 2:00 p.m. for Bail hearing.	
7-19-76		By CHREIN J - Order appointing counsel filed.	
7/22/76		Notice for Readiness for trial filed.	
7/23/76		Before BARTELS, J. - Case called. Deft & Counsel present. Defts motion to reduce bail argued. Motion granted. Bail reduced to \$5,000 surety. Motion to sever - motion argued. Decision reserved. Case adjd to 10/5/76 for trial.	

MILLER, DORIS ELAINE

Yr. Docket No. Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
	(Document No.)	(a)	(b)	(c)	(d)
	continuation..... of its finding within 45 days. Execution of sentence stayed to 1-3-77.				
12-10-76	Judgement and Commitment filed. Certified Copies to Marshal and Probation.				
1-3-77	Stenographer's Transcript dated October 14, 1976 filed.				
1-4-77	Certified Copy of Judgment and Commitment returned and filed From Marshal. Deft. Committed to M.C.C., New York on January 3, 1977.				
3-18-77	Before Bartels, J - case called - deft & atty D. De Carlo present - adjd to March 25, 1977 for sentence				
3-25-77	Notice of appeal filed. Docket entries and duplicate of Notice mailed to the court of appeals.				
3-25-77	Before Bartels, J - case called - deft & atty Dominick De Carlo present - deft sentenced pursuant to 18:5010(b) of the YCA. Execution of sentence is suspended and deft is placed on probation for 3 years. Special condition of probation is that deft is to reside with her mother and to take psychotherapy treatments as directed by Probation.				
3-25-77	Judgment and order of probation filed - certified copies to probation				

DATE	DOCUMENT NO.	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY					F. ADJ. U.S.
				Interval Section (a)	Start Date End Date (b)	Days (c)	Total Days (d)	Days (e)	
7-30-76		Before BARTELS, J. - case called - deft & counsel present - Govt moves to raise defts bail from \$5,000 surety to \$15,000. Bail raised to \$15,000. Counsel for the deft requests earlier trial, court agrees provided co-deft Welcome consents.							A
10/5/76		Before BARTELS, J.- Case called. Deft & Counsel present. Deft motion for reduction of bail - denied. Motion for severance denied. Defts motion to sever count 5, motion granted as to count 5. On motion of AUSA Appleby count 1 is dismissed. Trial ordered and begun. Jurors selected and sworn. Defts motion to remove jurors and for a mistrial denied. Trial contd to 10/6/76.							
10/8/76		Before BARTELS, J.- Case called. Deft & Counsel present. trial resumed. Defts motion for a mistrial denied. Trial contd to 10/7/76.							
10/7/76		Before BARTELS, J.- Case called. Deft & Counsel present. Trial resumed. Trial continued to 10/12/76.							
10-8-76		Copy of letter from Richard Appleby dtd 9-28-76 filed.							
10-12-76		Before BARTELS, J - case called - deft & counsel present - trial resumed - Govt rests - defts motion for judgment of acquittal is denied - trial contd to Oct. 13, 1976							H
10-13-76		Before BARTELS, J - case called - deft & counsel present - trial resumed - Identification hearing ordered and begun - hearing concluded - deft rests - Govt rests - defts motion for judgment of acquittal is denied - trial contd to Oct. 14, 1976							I
10-14-76		Before BARTELS, J - case called - deft & counsel present - trial resumed - deft sums up - Govt sums up - Jury retires to deliberate at 2:30 PM jury returns at 6 PM to hear testimony read back - Jury returns at 8:05 PM and renders a verdict of guilty on count 4 Jury discharged - trial concluded - sentence adjd without date. Defts motion for reduction of bail granted - deft released on \$1,000 PR Bond							M
10-14-76		5 stenographers transcripts filed (dated Oct. 5, Oct. 6, Oct. 7, Oct. 12 and Oct. 13, 1976 respectively)							N
10-14-76		By BARTELS, J.-Order of sustenance filed.(lunch)							O
10-14-76		By BARTELS, J.-Order of sustenance filed.(dinner)							P
10-14-76		By BARTELS, J.-Order of sustenance filed.(coffee)							R
10-14-76		By BARTELS, J.-Order of transportation filed.							T
10-21-76		Voucher of Compensation for expert Services - Filed.							U
12-10-76		Before Bartels, J.- Case Called. Deft. & Counsel present. Deft. sentence on count four for observation and study at an appropriate classification center or agency pursuant to the provisions of the Youth Corrections Act. T-18, U.S.C., Section 5010(e), and sentence is postponed until the Youth Correction Division makes its report to the court							W
FINE AND RESTITUTION PAYMENTS									
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER				

TRP:RA:mb
F1761,925

Indictment A 6

JUL 15 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76CR 449

UNITED STATES OF AMERICA

-against-

EUGENE WELCOME,
DEWITT OWENS and
DORIS ELAINE MILLER,

Defendants.

INDICTMENT

Cr. No.

(T.18, U.S.C., §§2,371,1202
(a)(1),1202(c)(3),2113(a),
2113(c), 2113(d)).

THE GRAND JURY CHARGES:

76CR 449

COUNT ONE

From on or about and between the 20th day of October 1975 and the 10th day of November 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendants EUGENE WELCOME, DEWITT OWENS, DORIS ELAINE MILLER and Vanessa Hodges and Willie Leach, named herein as co-conspirators but not as defendants, did knowingly and wilfully conspire to commit an offense against the United States, in violation of Title 18, United States Code, Sections 2113(a) and (d), by conspiring to take from the person and presence of employees of the Chemical Bank, 837 Flatbush Avenue, Brooklyn, New York, by force violence, intimidation and the use of dangerous weapons, Thirty Six Thousand Eight Hundred Ninety Seven Dollars (\$36,897.00), which currency was in the care and custody of the Chemical Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Section 371).

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendants EUGENE WELCOME, DEWITT OWENS, DORIS ELAINE MILLER

-2-

and co-conspirators Vanessa Hodges and Willie Leach committed, among others, the following:

OVERT ACTS

1. On November 10, 1975 the defendants EUGENE WELCOME, DEWITT OWENS and DORIS ELAINE MILLER and co-conspirators Willie Leach and Vanessa Hodges had a meeting at the residence of the defendant DORIS ELAINE MILLER, 346 Gates Avenue, Brooklyn, New York.
2. On November 10, 1975 the defendants EUGENE WELCOME, DEWITT OWENS, and co-conspirators Willie Leach and Vanessa Hodges, drove in a vehicle to the vicinity of the Chemical Bank, 837 Flatbush Avenue, Brooklyn, New York.
3. On November 10, 1975 the defendants EUGENE WELCOME, DEWITT OWENS and co-conspirator Willie Leach entered the Chemical Bank, 837 Flatbush Avenue, Brooklyn, New York at approximately 9:10 A.M.

COUNT TWO

On or about the 10th day of November 1975, within the Eastern District of New York, the defendants EUGENE WELCOME, DEWITT OWENS, DORIS ELAINE MILLER and Vanessa Hodges and Willie Leach, named herein as co-conspirators but not as defendants, knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chemical Bank, 837 Flatbush Avenue, Brooklyn, New York approximately Thirty Six Thousand Eight Hundred Ninety Seven Dollars (\$36,897.00), in United States currency, which money was in the care, custody, control, management and possession of the said Chemical Bank the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Sections 2113(a) and 2).

-3-

COUNT THREE

On or about the 10th day of November 1975, within the Eastern District of New York, the defendants EUGENE WELCOME, DEWITT OWENS and DORIS ELAINE MILLER and Vanessa Hodges and Willie Leach, named herein as ~~co-conspirators~~ but not as defendants, knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chemical Bank, 837 Flatbush Avenue, Brooklyn, New York, approximately Thirty Six Thousand Eight Hundred Ninety Seven Dollars (\$36,897.00), in United States currency, which money was in the care, custody, control, management and possession of the said Chemical Bank the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendants EUGENE WELCOME and DEWITT OWENS did assault and place in jeopardy the life of the said bank employees, as well as the lives of other persons present by the use of dangerous weapons. (Title 18, United States Code, Sections 2113(d) and 2).

COUNT FOUR

On or about the 10th day of November 1975, within the Eastern District of New York, the defendant DORIS ELAINE MILLER, knowingly and wilfully did receive, possess and conceal approximately Thirty Six Thousand Eight Hundred Ninety Seven Dollars (\$36,897.00), knowing the same to have been stolen from the Chemical Bank, 837 Flatbush Avenue, Brooklyn, New York, a bank whose deposits were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Sections 2113(c) and 2).

-4-

COUNT FIVE

On or about the 10th day of November 1975, within the Eastern District of New York, the defendant EUGENE WELCOME did knowingly and unlawfully possess a "firearm", as defined by Title 18, United States Code Appendix, Section 1202(c)(3), to wit, one black long barrel revolver, the defendant EUGENE WELCOME having previously been convicted of a felony in a Court of New York State. (Title 18, United States Code Appendix, Sections 1202(a)(1) and (c)(3)).

A TRUE BILL

John R. Rost
FOREMAN

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

GRsf 1
7am/1

CHARGE OF THE COURT

1203

2 Well, now, ladies and gentlemen, I always
3 remind the jury of the patience that they have
4 exhibited in cases of this kind. You have listened
5 attentively to the testimony and to the summations,
6 all three of them. And the testimony presented the
7 facts through witnesses and exhibits and the
8 summations presented the arguments of the attorneys,
9 pro and con, concerning those facts.

10 The time has come for you and for me to
11 perform our respective functions in the trial of
12 this case. You have been patient. You have heard
13 the voices of these attorneys and you have heard my
14 voice and now your voice is going to be heard.

15 Now, at the beginning I want to thank you and
16 I want to extend to you my appreciation for your
17 attentiveness and your alertness during the course
18 of this trial and also for the sacrifice which each
19 and every one of you must have made in neglecting
20 your business and your personal affairs to see that
21 the ends of justice might be accomplished in this
22 case.

23 You have been also very tolerant of the
24 unavoidable delays which we had to encounter and
25 you have been exceedingly interested in your task.

CHARGE OF THE COURT

1204

Every criminal prosecution is important to the government of the United States, and it is equally important to the defendants on trial. Each is entitled to equal, equal justice at your hands.

And from my experience, justice is best dispensed with in a calm, patient and deliberate manner and I sincerely request that you keep that attitude throughout your deliberations, when you go into your jury room.

Of course, you should respect the viewpoint of your fellow jurors. You should talk to each other with consideration and intelligence and you decide the issues in this case on the merits alone.

However, each juror should reach his own or her own conclusion and no juror should surrender or compromise his or her own belief or conviction as to the innocence or guilt of either of these defendants.

The evidence consists of the testimony of the witnesses and the exhibits admitted into the record and any facts which were stipulated by counsel. You must not consider any evidence which the Court has instructed you to disregard.

The quality of evidence is not necessarily

CHARGE OF THE COURT

1205

3 1
2 determined by the number of witnesses testifying
3 for one side or the other.

4 You have heard the evidence. You have heard
5 the arguments of counsel and now it becomes my
6 duty to give you the law governing this case, as I
7 said I would do at the conclusion of the summations,
8 when I spoke to you at the beginning of the trial.

9 But it is for you to accept the law as it is
10 given to you by the Court. That is to say, you must
11 not attempt to apply what you think the law should
12 be, if it has not been given to you by the Court.
13 It is only the law that I give you that you can
14 apply to the facts of this case.

15 You must determine the facts of the case for
16 yourself. It will be the proper application of the
17 law of the case to the facts of the case as you find
18 those facts to be which will determine your
19 verdict.

20 I wish to make it very plain to you and I
21 may repeat it maybe again, that the sole responsibility,
22 the sole power in determining the facts are with you.
23 Anything I may say or seem to say as indicating any
24 view or any opinion as to the facts is to be
25 ignored by you.

4 1
2 In determining those facts, you should not
3 be influenced by any rulings that the Court may have
4 made during the trial. Those rulings dealt with
5 matters of law and not questions of fact. The
6 Court's ruling on an objection made by any of these
7 attorneys and any questions which the Court posed
8 to any witness are not to be considered by you as
9 indicating either the guilt or the innocence of
10 either of these defendants.

11 The same is true with respect to any inflection
12 of the Court's voice relative to any such matters
13 or in connection with any comments or statements
14 the Court may have made to any of these attorneys.

15 You may wonder why the Court asks the
16 witnesses on occasion certain questions. The
17 reason was that some of the testimony of these
18 witnesses raised questions in the Court's mind, and
19 I felt that perhaps the attorneys did not bring out
20 all of the facts and consequently, I felt that those
21 questions might have also been raised in the
22 minds of the jury.

23 Now, for the sake of clarity only, were those
24 questions asked and they must not be deemed by you
25 as any indication of any opinion that the Court

CHARGE OF THE COURT

1207

1
2 may have in this case, or any opinion the Court
3 may have with respect to credibility of any
4 witness.

5 The Court expresses no opinion as to guilt
6 or innocence of the defendants The determination
7 of such guilt or innocence is a matter which is
8 exclusively with you.

9 All right.

10 There are some general principles of law
11 which are of importance in every criminal case. I
12 wish, first, to make some statements which apply to
13 criminal cases in general, after which I shall
14 endeavor to make clear to you what this particular
15 case involves.

16 It is an established principle that an
17 indictment is but a formal method of accusing a
18 defendant of a crime. It is not evidence of any
19 kind against the accused and it does not create any
20 presumption or permit any inference of guilt
21 against either of these defendants.

22 It is also a principle well recognized in
23 law that every person who is charged with the
24 commission of a crime is presumed to be innocent
25 and he is not required to prove that he is innocent,

CHARGE OF THE COURT

1208

6 1
2 and the burden rests on the government to prove,
3 to your satisfaction, beyond a reasonable doubt,
4 every element of crime, and that the party is guilty
5 as charged.

6 This presumption of innocence remains with the
7 defendants all through the case, until, if ever, it
8 is overborne, overborne by proof which satisfies
9 you beyond a reasonable doubt that the presumption
10 of innocence no longer remains with them.

11 The term "reasonable doubt" has been used in
12 this charge, has been referred to by counsel for one
13 of the defendants quite extensively. The term
14 "reasonable doubt" as used in this charge, does not
15 mean just any possible doubt that you may have,
16 but it means a reasonable doubt, as a careful,
17 prudent and reasonable man or woman ought to
18 entertain in the circumstances proved.

19 It means a doubt which is based on reason,
20 which is reasonable in view of all the evidence.
21 The key word is "reasonable".

22 I admit that that term is not subject to a
23 precise and definite definition, because there may
24 be a difference of opinion as to what is reasonable
25 and what is not reasonable. But a reasonable doubt

CHARGE OF THE COURT

1209

7 1
2 may arise from the evidence produced or from the
3 lack of evidence in the case.

4 It is the obligation of the government to
5 prove a defendant guilty beyond a reasonable doubt,
6 but it is not the obligation of the government to
7 prove a defendant guilty beyond the shadow of a
8 doubt.

9 It is rarely possible to prove anything to
10 an absolute certainty or beyond a possible doubt.
11 Seldom can one prove a controversial fact with
12 mathematical certainty. A reasonable doubt does not
13 mean a vain, fanciful, vague, or whimsical or some
14 imaginary doubt. Nor does it mean a possible doubt,
15 created by a reluctance on the part of the jury to
16 perform an unpleasant task.

17 It means a doubt arising out of the evidence,
18 or the lack of evidence, which is a reasonable
19 doubt.

20 Now, a reasonable doubt is a doubt that would
21 cause prudent men to hesitate to act in matters of
22 importance to them.

23 If, after a fair and an impartial consideration
24 of all of the evidence, or the lack of the evidence,
25 you have a reasonable doubt as to a particular

CHARGE OF THE COURT

1210

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defendant's guilt, then it is your duty to acquit
him or her.

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On the other hand, if, after a fair and
impartial consideration of all the evidence, you
believe that you have no doubt that is reasonable
as to a particular defendant's guilt, then it is
your duty to ~~convict~~ him or her.

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(Continued on next page.)

1211

8/1
HS:m

Charge of the Court

If there is a reasonable doubt in your minds about the guilt of a particular defendant on the charges in the indictment, he is entitled to the benefit of that reasonable doubt and to an acquittal on those charges.

If, on the other hand, you think a particular defendant's guilt is clear beyond a reasonable doubt, then you must find him guilty as charged. This is true with respect to both of these defendants.

Thus, you look at all the evidence introduced in this case and ask yourselves whether or not you are satisfied beyond a reasonable doubt that the offenses have been committed as charged in the indictment. If you are so satisfied, then it will be your plain duty to convict the defendant or the defendants, as the case may be, who committed these crimes. But if there exists in your minds a reasonable doubt of a defendant's guilt, you must give that defendant the benefit of that doubt and acquit that defendant of the charges in the indictment.

In this case there is more than one defendant; you must consider the innocence or the guilt of each defendant separately.

Now, the question of reasonable doubt is one

1212

Charge of the Court

which can be determined only by you. It cannot be determined by the arguments or the opinions of counsel. In reaching a conclusion with respect to reasonable doubt, you must consider all the evidence together, not just a particular segment or portion of the evidence isolated from all of the other evidence. You consider all of it together.

The machinery of trial calls for the exercise of varying functions by counsel, by the witnesses who testify, by the Court that presides, and by the jury. You, as the jury, exercise the fact-finding function.

As you have been told, you are the sole judges of the facts. That is to say, it is you who must consider the evidence, and you weigh the evidence, you draw inferences from the evidence, but only from the evidence.

You must take great pains to distinguish between mere arguments of counsel, which may have been made before you, and the evidence upon which those arguments rest. The repetition of an argument, however often or however dramatically made, does not constitute evidence. You must carefully analyze the assertions which have been made to you by counsel for the

Charge of the Court

1213

1 defendants and counsel for the Government, and you
2 ascertain what basis those assertions have in the
3 evidence.
4

5 Now, this brings us directly to the charges
6 in the indictment. For your guidance I shall read
7 the counts in the indictment which I have told you
8 are not evidence, but I think you ought to know
9 specifically what the charges are. I will begin
10 with count two. The other count you can ignore,
11 because it is no longer before the jury or the
12 Court. It begins with count two:

13 "On or about the 10th day of November, 1975,
14 within the Eastern District of New York, the defend-
15 ants Eugene Welcome, DeWitt Owens, Doris Elaine
16 Miller, named herein also as offenders as well as
17 aiders and abettors, and Vanessa Hodges and Willie
18 Leach, named herein as aiders and abettors, but not
19 as defendants, knowingly and wilfully, by force, viol-
20 ence and intimidation, did take from the persons and
21 presence of the employees of the Chemical Bank, 837
22 Flatbush Avenue, Brooklyn, New York, approximately
23 \$36,897 in United States currency, which money was
24 in the care, custody, control, management and pos-
25 session of the said Chemical Bank, the deposits of

Charge of the Court

1214

1 which bank then and there were insured by the Federal
2 Deposit Insurance Corporation, in violation of
3 Title 18 United States Code Sections 2113(a) and 2."

4 Now, you know there is an allegation that the
5 funds in the Chemical Bank, the deposits, were in-
6 sured by the Federal Deposit Insurance Corporation.
7 I think that has been stipulated to by the parties,
8 so there has been no specific mention of that in
9 summations, and I will not mention it because it
10 is agreed that those deposits were insured by the
11 Federal Deposit Insurance Corporation.
12

13 Count three states:

14 "On or about the 10th day of November, 1975,
15 within the Eastern District of New York, the defend-
16 ants Eugene Welcome, DeWitt Owens and Doris Elaine
17 Miller, Vanessa Hodges and Willie Leach, named
18 herein as co-aiders, abettors and offenders, but
19 not as defendants"-- that is to say DeWitt Owens
20 and Vanessa Hodges were not specifically named --

21 MR. APPLEBY: I believe DeWitt Owens was
22 named as a defendant. It is Willie Leach and
23 Vanessa Hodges who were named as co-offenders, but
24 not as --

25 THE COURT: I am glad that you brought that

1
2 to my attention.

3 It says that DeWitt Owens is named as a
4 defendant, that Vanessa Hodges and Willie Leach are
5 not named as defendants.

6 "-- not as defendants, knowingly and willfully,
7 by force, violence and intimidation, did take from
8 the person and presence of employees of the Chemical
9 Bank, 837 Flatbush Avenue, Brooklyn, New York,
10 approximately \$36,897 in United States currency,
11 which money was in the care, custody, control, man-
12 agement and possession of the said Chemical Bank,
13 the deposits of which bank then and there were
14 insured by the Federal Deposit Insurance Corporation
15 -- and this is the new addition -- and in the commis-
16 sion of this act and offense, the defendants Eugene
17 Welcome and DeWitt Owens -- it leaves out the other
18 defendants -- did assault and place in jeopardy the
19 lives of said bank employees, as well as the lives
20 of other persons present, by the use of dangerous
21 weapons, in violation of Title 18 United States
22 Code Sections 2113(d) and 2."

23 The one mentioned in count two is 2113(a).

24 Now, you notice I also referred to Title 18
25 Section 2, and that simply refers to aiding and

Charge of the Court

1216

1 abetting. It covers not only the actual offenders,
2 but also those that aided and abetted those offenders.
3

4 We have one other count, which is count four:

5 "On or about the 10th day of November, 1975,
6 in the Eastern District of New York, the defendant
7 Doris Elaine Miller, knowingly and wilfully did
8 receive, possess and conceal approximately \$36,897,
9 knowing the same to have been stolen from the Chemical
10 Bank, 837 Flatbush Avenue, Brooklyn, New York, a
11 bank whose deposits were then and there insured
12 by the Federal Deposit Insurance Corporation, in
13 violation of Title 18, United States Code Section
14 2113(c) and also Title 18, United States Code
15 Section 2."

16 Now, the statutes claimed to have been vio-
17 lated are Sections 2113(a), 2113(c), 2113(d) and
18 Section 2, all with respect to Title 18 of the United
19 States Code.

20 As I said before, it has been agreed that
21 the Chemical Bank that was robbed, was insured by
22 the Federal Deposit Insurance Corporation. I will
23 then begin to read to you Section 2113(a) -- that
24 is the pertinent portion of it which is mentioned
25 in count two. That is the first count I mentioned.

1217

7 1 The pertinent portion of Section 2113(a) of Title
2 18 of the United States Code reads as follows:

3 "Whoever, by force and violence, or by intimid-
4 idation, takes, or attempts to take, from the person
5 or presence of another any property or money or any
6 other thing of value belonging to, or in the care,
7 custody, control, management, or possession of,
8 any bank," shall be punished as described in the
9 statute.

10 The elements of the offense set forth in
11 this section and in count two of the indictment
12 are:

13 One: The willful and intentional taking
14 from the person or the presence of another of any
15 money in the custody and possession of any bank;

16 Two: The use of force and violence, or
17 intimidation, in such taking.

18 The burden is upon the Government to prove
19 beyond a reasonable doubt both of those elements
20 of the offense and failure to do so is fatal to
21 the prosecution and will entitle the defendants
22 to a verdict of acquittal on this count.

23 Let us then proceed to the next count and
24 the section which is claimed to have been violated
25 in that count.

Charge of the Court

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1
2 Section 2113(d) -- I just read (a) to you --
3 of Title 18 of the United States Code refers to the
4 use of weapons in committing the offense and reads
5 in pertinent part as follows:

6 "Whoever, in committing, or in attempting
7 to commit, any offense defined in subsections (a)
8 and (b) of this section, assaults any person, or
9 puts in jeopardy the life of any person by the use
10 of a dangerous weapon or device" shall be punished
11 as described in the statute.

12 Now, the elements of the offense set forth
13 in this section and count three of the indictment
14 are:

15 One: committing or attempting to commit the
16 offense of taking by force funds belonging to a
17 bank as defined in the preceding section 2113(a),
18 and paragraph two, the willful and intentional placing
19 in jeopardy the life of any person by the use of a
20 dangerous weapon or device in the commission of
21 that offense.

22 The burden is upon the Government to prove
23 beyond a reasonable doubt that both of these elements
24 of the offense, i.e., the offense of robbery and the
25 use of a dangerous weapon in committing the robbery,

Charge of the Court

and failure to do so is fatal to the prosecution and entitles the defendants to a verdict of acquittal on this count.

Count four of the indictment, which is the last count I read to you, charges the defendant Doris Elaine Miller, but not the other defendants, with a violation of section 2113(c) of Title 18 of the United States Code. Before reading the pertinent portion of Section 2113(c) of Title 18 of the United States Code, it is advisable that I read to you the pertinent portions of Section 2113(b) of Title 18 of the United States Code first, because 2113(c) refers back to Section 2113(b).

Now, the pertinent portion of Section 2113(b) of Title 18 of the United States Code reads as follows:

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody or control, management, or possession of any bank, credit union, or any savings and loan association," shall be punished.

(Continued on next page.)

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Charge of the Court

That is not the section claimed to be violated by Doris Elaine Miller. The pertinent section of 2113(c) of Title 18 of the United States Code which is covered by count four of the indictment reads as follows:

"Whoever receives, possesses, conceals, stores, or disposes of any property or money or other thing of value, knowing the same to have been taken from a bank, in violation of subsection (b) of this section, shall be subject to the punishment provided by said subsection (b) for the taker of the funds."

The elements of the offense set forth in this section and in count four of the indictment are:

"1. That the offense of bank robbery or stealing with intent to steal from a bank has been committed;

"2. That the defendant, who is in this case and according to the indictment was Doris Elaine Miller, knowingly and willfully did receive, possess, conceal, store or dispose of funds belonging to a bank; and

"3. That at that time she knew that these funds were taken or stolen from a bank."

The burden is upon the Government to prove

Charge of the Court

1221

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2 beyond a reasonable doubt that all of these elements
3 of the offense, and failure to do so is fatal to
4 the prosecution and entitles the defendant Doris
5 Elaine Miller to a verdict of acquittal on count
6 four of the indictment.

7 You will note in the indictment Title 18
8 Section 2 is referred to throughout these three
9 counts, and that section refers to aiders and
10 abettors, and I therefore must give you an instruc-
11 tion on aiding and abetting, because that's in a
12 separate category.

13 In counts two, three, and four of the indict-
14 ment all the defendants are accused of aiding and
15 abetting each other in the commission of the offenses
16 set forth in the counts of the indictment, except
17 count four does not charge any other defendant
18 except Doris Elaine Miller, and the offenses con-
19 tained in the statute which I have read to you,
20 that is, the offenses of bank robbery and knowingly
21 receiving and possessing funds belonging to a bank,
22 knowing the same to have been stolen from the bank.
23 Section two of Title 18 of the United States Code
24 referred to in counts two, three, and four of the
25 indictment, places in the category of a principal

12 1

Charge of the Court

1122

2 offender anyone who aids or abets an offender. This
3 section reads as follows:

4 "(a) Whoever commits an offense against the
5 United States or aids, abets, counsels, commands,
6 induces or procures its commission, is punishable
7 as a principal.

8 "(b) Whoever willfully causes an act to be
9 done which is directly performed by him or another
10 would be an offense against the United States, is
11 punishable as a principal."

12 Now, this section is self-explanatory.

13 Thus, anyone who aids and abets or procures
14 the commission of the offense is in the same cate-
15 gory as the person who actually commits the offense.
16 To state it another way, anyone who does not commit
17 the offense himself but aids or abets an offender
18 or causes an act to be done, which if directly
19 performed by him would be an offense against the
20 United States, is a principal. In other words,
21 anyone who shares in the criminal intent of the
22 principal and is wilfully associated with the venture
23 in a way that by his action he wilfully participates
24 in or assists in the bringing about the ultimate
25 result, is, under this section, in the same position

13

Charge of the Court

as a principal.

The burden is upon the Government to prove, beyond a reasonable doubt, that:

1. There was an offense committed against the United States by a principal, such as a bank robbery, or wilfully receiving money stolen from a bank, knowing the same to have been stolen, and

2. The defendants wilfully and knowingly aided and assisted in its commission, and failure of the Government to prove both of these elements beyond a reasonable doubt is fatal to the prosecution and entitles the defendants to a verdict of acquittal on the charge of aiding and abetting.

I am only referring to the charge of aiding and abetting now.

Of course, if there were no principal who committed an offense, there can be no one who could be guilty of aiding and abetting. In this case I think it has been admitted that a bank robbery did occur, but nothing else has been admitted.

You must consider each count separately and you must consider the evidence against each defendant separately, regardless of the evidence against the other defendants.

Charge of the Court

1124

1 In other words, you must determine whether
2 the evidence is or is not sufficient beyond a reason-
3 able doubt in such individual count against each
4 separate and particular defendant in order to arrive
5 at a verdict as to each defendant.
6

7 I will refer to the Government's contention
8 just in a word. I will not marshal the evidence,
9 because the case has not been a long case. In a
10 word, the Government contends that on the 10th day
11 of November, 1975, the defendants Eugene Welcome,
12 Dewitt Owens and Doris Elaine Miller, and Vanessa
13 Hodges and Willie Leach robbed by force and violence
14 the Chemical Bank at 837 Flatbush Avenue, Brooklyn,
15 of approximately \$36,800, and that in doing so the
16 defendants Eugene Welcome and Dewitt Owens placed
17 in jeopardy the lives of the bank employees as well
18 as the lives of other persons by the use of dangerous
19 weapons.

20 In addition, the defendant Doris Elaine
21 Miller was charged with knowingly and willfully
22 receiving approximately \$36,800, knowing the same
23 to have been stolen from the Chemical Bank at 837
24 Flatbush Avenue, Brooklyn.

25 It charges a violation of the statute and I

Charge of the Court

15 1 have read that statute to you, which I will read
2 again if you so desire.
3

4 The Government produced the following wit-
5 nesses in support of these charges: Vanessa Hodges,
6 a co-defendant -- she is not mentioned as a co-
7 defendant, but at least a co-offender; Dewitt Owens,
8 a co-defendant, Jerry Loar, an FBI agent, Samuel
9 Witchner, an FBI agent; Donald L. Weber, an FBI
10 agent; and as to the alleged similar subsequent
11 robbery of March 1, 1976, they produced Robert
12 Gilbert, who was an officer of the Chemical Bank at
13 the time of the March 1, 1976 robbery.

14 The defendants entered a plea of not guilty,
15 which as you know is a denial of their guilt to
16 any participation in this robbery.

17 The defendants claim that they did not con-
18 duct any bank robbery on November 10, 1975, nor
19 were they present when such robbery was committed,
20 nor did they receive the funds which the Government
21 charges Doris Elaine Miller with having received.

22 In addition, the defendants claim that they
23 never planned any bank robbery, nor had they any
24 knowledge of the bank robbery. They also claim
25 they had no knowledge of the bank robbery which

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Charge of the Court

took place on March 1, 1976.

The purpose of the testimony concerning the March 1, 1976 robbery by a government witness has already been described to you.

Now, I say at this point, if you find the defendant Miller guilty on counts two and three, you need not proceed to count four with respect to the charge against her. Only if you find her innocent on both counts two and three, may you proceed to count four.

As I indicated before, the case has been a very short one and I will not give you a resume of the testimony, because I think you will remember it as well as I. After all, it will be your recollection of the evidence that will count in this case and you must understand that the Court does not express and has not expressed directly or indirectly, subtly or otherwise, by intonation or gesture, any opinion concerning any of the facts that are involved in this case. If the attorneys or any one of them have misstated the testimony, please disregard such misstatement.

Again, I must advise you that it is going to be your recollection of the testimony that will control

Charge of the Court

1227

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2 in your deliberations and not the attorneys' argument.

3 I think a word is necessary on the subject
4 of circumstantial evidence. The Government's case
5 against the defendants rested on both direct and
6 circumstantial evidence. Circumstantial evidence
7 is evidence of a fact or one fact from which you
8 may reasonably infer the existence or the non-exist-
9 ence of another fact. For example -- and I have given
10 this example again and again -- suppose you are in
11 a room with no windows and a person comes to your
12 house wearing a raincoat which is wet, carrying an
13 umbrella which is wet. That would be circumstantial
14 proof that it is raining outside, even though you
15 did not otherwise know it was raining.

16 I will give you another illustration which I
17 give again and again, perhaps which is a little
18 closer to home right here in the courtroom. Suppos-
19 ing a member of the jury were to ask the court report-
20 er, who we shall call Clerk No. 1, for a pad
21 and pencil to make some notes, and suppose that
22 after the jury took a recess the juror came back and
23 another court clerk, the deputy courtroom clerk over
24 here whom we shall call Clerk No. 2, suppose there-
25 after Clerk No. 2, not Clerk No. 1, whom the member

18

Charge of the Court

of the jury first spoke with, were to hand this juror a pad and pencil. That would be circumstantial evidence that Clerk No. 1 had given the juror's message to Clerk No. 2.

As the words indicate, circumstantial evidence means evidence involving circumstances surrounding the incident and details as distinguished from direct personal observations. It is more than and it is fundamentally different from mere conjecture or surmise. No one is to be convicted on the basis of simple guesswork or speculation. An inference that is reasonably drawn from the facts testified to is evidence. In analyzing the evidence, you may draw reasonable inferences based upon your own common sense and your general experience from any facts which you find were actually proved.

An inference may be drawn from a proven fact. It may not be drawn from another inference. We do not have an inference upon an inference, but when two inferences may be equally drawn, one consistent with guilt and one consistent with innocence -- and you notice I said "equally drawn" -- you must draw the inference of innocence.

(Continued on next page.)

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Charge of the Court

1219

1 THE COURT (Cont'd): A logical inference is
2 to be distinguished from sheer speculation.
3

4 Circumstantial evidence is legal. It is
5 acceptable evidence. That is to say, you may draw
6 reasonable inferences based upon your own common
7 sense and general experience from any facts that
8 you find were actually proved.

9 Circumstantial evidence is that evidence
10 that tends to prove a disputed fact by proof of
11 other facts, which have a legitimate tendency
12 to lead the mind to a conclusion that the fact
13 exists, which is sought to be established.

14 Circumstantial evidence may consist of an
15 accumulation, an accumulation of many details which
16 are so logically interrelated and so consistent with
17 each other and so inherently probable that you may
18 not have the slightest doubt as to its truthfulness
19 or its accuracy.

20 As a general rule, the law makes no distinc-
21 tion between direct and circumstantial evidence.

22 Circumstantial evidence may alone be enough
23 to convict; but that circumstantial evidence
24 must be so convincing that it leaves you with no
25 reasonable doubt after you consider all the

Charge of the Court

1220

2 1
2 2 circumstantial and other evidence as to either de-
3 3 fendant, you must acquit that particular defendant
4 4 with respect to whom you have such a reasonable
5 5 doubt.

6 6 As I told you at the beginning of the trial,
7 7 the Government charged these defendants with
8 8 robbery or aiding and abetting the robbery of
9 9 the Chemical Bank on November 10, 1975.

10 10 In this trial, these defendants are not
11 11 charged with any other bank robbery. However,
12 12 in connection with this case, there was testimony
13 13 by Vanessa Hodges referring to a bank robbery of
14 14 the Chemical Bank by the defendant Eugene Welcome
15 15 on March 1, 1976, after the robbery that took
16 16 place on November 10, 1975.

17 17 You will, I think, recall that testimony,
18 18 as well as I. This testimony, as I previously
19 19 instructed you, was offered for the purpose of in-
20 20 dicating the identity or the possible identity of
21 21 the defendant Eugene Welcome as one of the persons who
22 22 actually participated in the robbery that took
23 23 place on November 10, 1975. That is, before
24 24 March, 1976, and the testimony concerning the
25 25 March, 1976, robbery was offered as some evidence

Charge of the Court

1221

that Eugene Welcome had an intent or plan to rob the Chemical Bank on November 10, 1975.

However, you may not find Eugene Welcome guilty of any of the charges in this indictment concerning the November 10, 1975, bank robbery simply because there is testimony that he participated in the March 1, 1976, bank robbery.

You must have much more than that. That is simply some evidence that you may accept or reject.

Vanessa Hodges also testified the defendant Doris Elaine Miller shared in the proceeds or had possession of some of the proceeds of the March, 1966, robbery, knowing that such proceeds were stolen from the bank.

This testimony was offered to show that Doris Elaine Miller had knowledge and the intent and participated in the sharing of the proceeds or the possession of the proceeds of the November 10, 1975, robbery.

You may accept or you may reject that testimony. You may accept it with respect to the defendant Welcome and reject it with respect to the defendant Doris Elaine Miller, or vice versa. That is, accept it with respect to Doris Elaine Miller and reject

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Charge of the Court

it with respect to Eugene Welcome, or may reject it completely with respect to both of these defendants.

As I indicated to you, the testimony cannot be considered except for any other purpose except for the purpose of showing the possible identity of Eugene Welcome or the plan or intent of Eugene Welcome in connection with the November 10, 1975, robbery.

As far as Doris Elaine Miller is concerned, only with respect to showing that she had knowledge of the November 10, 1975, robbery and received the proceeds therefrom, knowing the same to have been stolen.

However, you may not find Doris Elaine Miller guilty of any of the charges in this indictment concerning the November 10, 1975, bank robbery, simply because there is testimony that she participated in the March 1, 1976, bank robbery.

In other words, you could only consider it as part of all the evidence, but you cannot consider that by itself as any evidence that either of these defendants were involved in the November 10, 1975 bank robbery.

Charge of the Court

I hope I have made that clear but you can consider it together with other evidence. If you wish to, you can reject it completely. It will be up to you to decide whether or not you believe the defendant Vanessa Hodges on this point and what bearing you will give that testimony in connection with the offense with which both of these defendants are now charged in this indictment.

Now, concerning the testimony in this case, I must inform you also that the mere presence of a defendant at a place where others had illegal possession of funds, knowing the same to have been stolen, is not sufficient to charge that defendant.

You must find that that particular defendant received or in some way participated in the receipt of or aided and abetted others in the illegal possession of the funds, knowing the same to have been stolen.

Knowing participation or association with the illegal venture of knowingly possessing stolen funds, knowing the same to have been stolen, as I have outlined to you, will be sufficient to constitute aiding and abetting.

As I think I told you at the beginning of

Charge of the Court

1234

the trial, the Government does not charge either of threse defendants with conspiracy.

The Government does charge both defendants with bank robbery and, in addition, does charge the defendant Miller with willfully and knowingly receiving and possession and concealing approximately \$36,000, knowing the same to have been stolen from the Chemical Bank.

(Continued on next page.)

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CHARGE OF THE COURT

1235

1 While there is no conspiracy charged here,
2
3 there was testimony by both Vanessa Hodges and
4
5 Dewitt Owens concerning a certain common plan among
6
7 the defendants to rob a bank and to thereafter divide
8
9 the proceeds.

10 When two or more persons knowingly associate
11
12 themselves together to carry out a plan or an under-
13
14 standing with an intent to accomplish some unlawful
15
16 object or purpose, there arises from that very act of
17
18 knowingly associating themselves together with such
19
20 an understanding an intent, a partnership or joint
21
22 venture in which each member becomes the agent of every
23
24 other member for that purpose.

25 So where the evidence in the case shows such
a common plan, an arrangement or understanding, evidence
as to an act knowingly done or a statement knowingly
made by one of the participants or partners or joint
adventurers while the common plan or arrangement is
in effect, and in furtherance of some object or purpose,
is admissible against all who are a party to such
common plan or arrangement.

You first determine from all the evidence re-
lating to the period of time involved whether or not
there was a common plan among the parties involved and

CHARGE OF THE COURT

whether or not either of the present defendants associated themselves with all the other parties mentioned in the indictment for the purpose of committing an unlawful act under the plan.

But of course you could only charge the particular defendant who actually became a party to the plan. If you decide that these defendants did not associate themselves together under such a plan for that purpose, you must next decide whether a particular defendant became a member of a common plan or arrangement.

In determining whether a particular defendant became a member of a plan or the partnership, you must do so by evidence or testimony with respect to that particular defendant's own conduct.

That is to say, what this particular defendant himself or herself said or did, according to the testimony, and not what others said or did, according to the testimony.

However, once you have decided from the testimony of a witness that a particular defendant was a member of the plan, arrangement or partnership using this test, you may then consider, as if made by him or her, the statements and declarations of other members, made

CHARGE OF THE COURT

1227

3 1
2 thereafter in furtherance of the objects or the pur-
3 pose of the common plan or arrangement. I should say
4 here also, that mere association or acquaintance of
5 one defendant with another does not establish the
6 existence of a joint plan or partnership to commit
7 an unlawful act.

8 Any admission or incriminatory statement made
9 or any act done by one person who is not a member of
10 the partnership or joint venture may not be considered
11 as evidence against any defendant who is not present
12 and was not a member of the plan or partnership and
13 did not participate in the act and did not hear the
14 statement made.

15 However, if you decide that no plan existed or
16 if there was one, that a particular defendant was not
17 a member, then you must determine from the evidence
18 whether that particular defendant without regard to
19 statements or acts by the other defendants violated
20 the statute by robbing a bank or in aiding or abetting
21 the robbery of a bank or by knowingly receiving
22 and possessing monies stolen from the bank, knowing
23 the same to have been stolen or by aiding and abetting
24 such receipt and possession of monies stolen from
25 the bank.

CHARGE OF THE COURT

4 1
2 At this point I charge, as has been brought out
3 by the evidence, that both the defendant Vanessa
4 Hodges and the defendant, Devitt Owens have pleaded
5 guilty to certain offenses for which they have been
6 indicted, and you have heard evidence as to what
7 they consisted of, but I wish to make it clear, this
8 plea by these two defendants has no bearing upon the
9 guilt or the innocence of the defendants Eugene Welcome
10 and Doris Elaine Miller.

11 The defendant Eugene Welcome took the stand,
12 as you recall. He testified in his own behalf.
13 Similarly, the defendant, Doris Elaine Miller took
14 the stand and she testified in her own behalf. A
15 defendant who wishes to testify is a competent witness
16 and his or her testimony should not be disbelieved
17 merely because he or she is a defendant.

18 (cont'd on next page)
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CHARGE OF THE COURT

1239

1 THE COURT: (Cont'd.) Nevertheless, in
2 weighing Welcome's testimony, you may consider the
3 fact that he has a vital interest in the outcome
4 of this trial. And likewise, in weighing Miller's
5 testimony, you may consider the fact that she has a
6 vital interest in the outcome of this trial.
7

8 Just a word on the definition of the term
9 "possession" as it is used in the statute and in the
10 criminal law. The defendant Welcome has been
11 charged not only with robbing a bank and the
12 defendant Miller has been charged not only with
13 knowingly possessing monies stolen from the bank,
14 knowing the same to have been stolen, but also with
15 aiding and abetting others in the commission of
16 these offenses.

17 Knowing participation in or association with
18 the illegal venture or of knowingly receiving and
19 possessing monies stolen from a bank, knowing the
20 same to have been stolen will be sufficient to
21 constitute aiding and abetting.

22 However, possession, whether it be of monies
23 or of inventory or of any other object, may be
24 actual physical possession, and in this case, it may be
25 actual physical possession of stolen monies, or it

CHARGE OF THE COURT

1240

may be "constructive possession".

What is constructive possession? Well, constructive possession means that although a particular defendant did not actually have the physical possession of the stolen monies, his or her relationship with such monies was such that he had, either alone or together with others, some dominion or some control over such stolen monies.

Under such circumstances, it is said that a person has constructive possession of monies in question. Dominion and control alone or together with others are the key words to constructive possession.

It is possible for a person to have either physical or constructive possession of stolen monies or to have such possession jointly, with others.

To sum up, where one or more persons are involved, all or only some of those persons may be in joint or constructive possession of monies. If you find that the stolen monies were in the joint possession, physical or constructive, of both defendants, then you need not consider the question of aiding and abetting on that point.

CHARGE OF THE COURT

1241

3 1 I am not talking about the bank robbery. I
2 am talking about the possession of the funds.

4 If, however, you find that the possession,
5 physical or constructive, of the stolen monies was
6 jointly held by only some of the defendants or held
7 by only one of the defendants, then you may proceed
8 to ascertain whether the other defendants aided and
9 abetted the possessing defendant or defendants in
10 obtaining knowing possession of the stolen monies.

11 All of the defendants need not have
12 possession of the stolen money at the same time.

13 Now I think when I described to you the
14 elements of the offenses involved here, I mentioned
15 that knowledge and intent was necessary as one of
16 the elements for conviction.

17 I think a word therefore on knowledge and
18 intent is necessary. You and I cannot look into
19 one's mind and ascertain what knowledge or intent
20 he or she had. Knowledge, as well as intent, is des-
21 criptive of a state of mind and as an element of the
22 offense is seldom, if it is ever, susceptible of
23 direct proof.

24 The proof of this element of knowledge and
25 intent may rest, as it frequently does, on evidence

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CHARGE OF THE COURT

1242

1 of facts and circumstances from which it clearly
2 appears as the only reasonable and logical inference
3 that a defendant knew that he was in possession of
4 funds stolen from a bank.
5

6 But in determining knowledge and intent, you
7 may consider the intelligence or the sophistication
8 of a particular defendant. This is also true with
9 respect to knowledge and intent in connection with
10 the actual bank robbery itself.

11 No person can intentionally avoid knowledge
12 by closing his eyes to the facts that would lead a
13 reasonable man to investigate.

14 However, mere suspicion that something is
15 wrong or improper is not equivalent to knowledge
16 or intent. On the other hand, knowledge and intent
17 may be inferred from the acts of the party and it
18 is a question of fact to be determined from all of
19 the circumstances.

20 The jury may scrutinize a particular defendant's
21 entire conduct at the time the offenses alleged were
22 committed.

23 No person can disclaim knowledge merely by
24 closing his eyes intentionally to facts which would
25 otherwise have been obvious to a reasonable man.

CHARGE OF THE COURT

1243

5 1
2 The circumstances sufficient to support a charge
3 of knowledge and intent, to possess funds stolen
4 from a bank must be sufficiently persuasive, however,
5 as to exclude the inference of innocence or
6 innocent possession, under the circumstances.

7 You have heard these lawyers tell you that I
8 am going to instruct you as to the testimony of an
9 accomplice. This is necessary under the
10 circumstances.

11 Now, the fact that a person is an accomplice
12 or has prior felony convictions does not disqualify
13 him or her from testifying as a witness. It does
14 not necessarily mean that his or her testimony is
15 untruthful.

16 These facts, however, do bear on credibility.
17 The testimony of an accomplice, of course, should
18 be taken with great caution and it should be
19 scrutinized very carefully by you.

20 Moreover, you must give careful consideration
21 to any motive or bias which Vanessa Hodges or
22 DeWitt Owens may have had to give false testimony
23 and to decide whether their testimony was so
24 influenced by the hope or belief that they might
25 receive a lighter sentence or a lesser charge as

CHARGE OF THE COURT

1244

not to be credible.

It should be stated in this connection that whatever statements were made to either Vanessa Hodges or DeWitt Owens concerning a lighter sentence by reason of any cooperation with the government, were not made by this Court, directly or indirectly.

Vanessa Hodges and DeWitt Owens, however, do have hopes and expectations which are predicated upon probabilities, based upon what this Court has done in the past, upon a recommendation arising out of cooperation by the defendants.

Hope and belief on the part of an accomplice for a lighter sentence, however, does not necessarily mean that the accomplice is testifying falsely. Such hope or belief is simply a factor which should be considered by you.

You look at Vanessa Hodges and you look at DeWitt Owens and you decide whether their stories are inherently probable or improbable and whether their testimony carries with it the ring of truth or whether either is not telling the truth and it was an imaginary fabrication.

You ask yourselves whether and to what extent Vanessa Hodges and DeWitt Owens stood up under

CHARGE OF THE COURT

1245

cross-examination on the material issues involved.

The credence you give to these witnesses depends upon your own common sense and your own good judgment, which you exercise with respect to the truth and the veracity of all witnesses.

The credence you give to these witnesses also depends upon, as I said before, what are the inherent probabilities of their stories.

There is no requirement in the law that the testimony of an accomplice be corroborated. But you are required to scrutinize such testimony with the utmost care and circumspection.

You may, after a fair determination of the issue of credibility, believe or disbelieve the testimony of either or both of these accomplices, either in whole or in part. But you must consider the testimony with respect to each defendant separately and apart from their testimony, that is, Vanessa Hodges and DeWitt Owens' testimony, concerning the other defendants.

In other words, you could find the defendant Eugene Welcome and the defendant Doris Elaine Miller not guilty or you could find the defendant Doris Elaine Miller guilty and the defendant

1 Eugene Welcome not guilty.

2
3 Now, as counsel for one of the defendants
4 referred to testimony of Robert Gilbert, he stated
5 that the question of identification testimony should
6 be, and I would so charge you, scrutinized very
7 carefully.

8 So I do charge you. There was testimony of
9 Robert Gilbert an officer of the Chemical Bank, that
10 was robbed or allegedly robbed on March 1, 1976,
11 identifying the defendant Eugene Welcome as the
12 robber or one of the robbers.

13 Now, this testimony was offered in connection
14 with the testimony of that similar subsequent act.
15 I mentioned that to you before. You should consider
16 identification testimony with great caution and
17 no class of testimony is more uncertain and less to
18 be relied on than that as to identity.

19 However, in reaching the conclusion as to
20 whether or not you will believe Mr. Gilbert, you
21 consider all the circumstances of his testimony and
22 what opportunity he had to identify Eugene Welcome.

23
24 (Continued on next page.)
25

1247

Charge of the Court

We come now to a rather important issue and that is entitled "The credibility of witnesses."

In considering the evidence you exercise the exclusive function of passing upon the credibility of the witnesses. You can see this is a very important function, because to determine where the truth lies you must of necessity decide who is telling the truth. In fact, it goes to the very essence of the administration of justice. How you are to determine who is telling the truth must be left to your own determination. Among other things, in determining the credibility of a witness, the jury may consider his or her motive in testifying, his or her motive in falsely testifying or truthfully testifying; you consider his or her manner and demeanor on the witness stand, his or her interest, his or her prejudice or bias, if any, or whether he or she has a purpose to serve which might color his or her testimony.

Interest does not necessarily mean that a witness is untruthful. It is simply or merely an element that you may consider in reaching your determination upon the question of whether or not he or she is telling the truth. You consider the witness's

Charge of the Court

1248

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2 demeanor. To use a colloquial expression, you
3 "size him up" when he tells you anything, and you
4 decide whether or not he or she strikes you as a
5 candid witness with respect to the issues in this
6 trial, or whether he or she strikes you as a person
7 who is not telling the truth, either intentionally
8 or unintentionally.

9 You may also consider the witness' intelli-
10 gence, his or her state of mind, his or her ability
11 to observe the matters as to which he or she has
12 testified, and whether he or she impresses you as
13 having an accurate recollection of those matters.

14 You should also consider the inherent -- the
15 inherent probability or the inherent improbability
16 of a witness' testimony. Of course, you should
17 consider the inconsistencies or discrepancies in
18 the testimony of a witness or between the testimony
19 of that witness and other witnesses. Such inconsis-
20 tencies or discrepancies may or may not cause you
21 to discredit a witness' testimony, but two or more
22 persons witnessing an incident or a transaction may
23 see or hear it differently or they may remember it
24 differently, and an innocent misrecollection
25 like a failure of recollection is not an uncommon

Charge of the Court

3 1
2 experience. Moreover, it is not uncommon for a
3 witness to fail to remember the exact time of day
4 or the exact day of an event or transaction which
5 occurred some time ago, nor to remember unimportant
6 or insignificant details of an event. You decide
7 whether this misrecollection of such details is
8 innocent misrecollection or intentional falsehood,
9 and in so doing you use your own experience in
10 reaching that conclusion.

11 In weighing the effect of an inconsistency
12 or a discrepancy, always consider whether it per-
13 tains to a matter of importance or an unimportant
14 detail, and also whether the inconsistency or dis-
15 crepancy results from an innocent error or an
16 intentional falsehood, and whether the discrepancy
17 referred to a material or immaterial issue in the
18 case.

19 Another consideration is whether or not the
20 witness has been contradicted by other credible
21 evidence, and whether or not he or she has made
22 statements at other times and places under oath,
23 or otherwise, which contradicted or are contrary
24 to those made by him or her upon the witness stand.

25 As to the latter, you should again consider

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Now, as I said before in determining where the truth lies, you must rely upon your common sense. You cannot use your imagination, unsupported by any evidence, to determine what actually did happen. You must rely on the evidence. There cannot of

Charge of the Court

1251

1 course be any guesswork in the determination of the
2 facts, except reasonable inferences that may be
3 drawn from actual facts in evidence. But you have
4 the right, as I said, to draw inferences from the
5 evidence, but only from the evidence. You must stick
6 to the evidence.
7

8 Of course the jury is not bound to believe
9 inherently improbably or unreasonable statements
10 made by any witness just because the witness who made
11 them was under oath. The jury has a right in apprais-
12 ing a particular witness' credibility, as to all or
13 part of his or her testimony, to consider the probabil-
14 ity or improbability of that testimony when viewed in
15 light of all the circumstances and other evidence
16 in the case.

17 If you find that any witness has knowingly
18 testified falsely to a material fact, you may dis-
19 regard the entire testimony of that witness; or you
20 may accept that which you believe to be true and
21 disregard the balance. If you disregard his or her
22 testimony altogether, and the guilt of any defendant
23 is dependent upon such testimony, then you must
24 acquit that particular defendant.

25 Now, it is going to be for you to determine

1252

Charge of the Court

whether a witness, whoever he or she may be, is telling the truth as to all facts, or only with respect to some of the facts, or whether he or she is telling the truth at all. The test as to whether you believe this witness is the same test which you apply in your everyday business or in your home affairs, where you are called upon every day to make similar determinations.

You have had experiences. Do not think, members of the jury, when you come into this jury box and are sworn as jurors that you are going to lay aside your own business and everyday experiences. That is simply not so. In fact, you are being called upon now to use that business and everyday experience to assist you in determining any conflict in the evidence in this case.

You are going to be the exclusive judges in determining where the truth lies.

Now, I need not tell you that in this case some of the witnesses are not telling the truth, either intentionally or innocently, and it is going to be for you to determine who is telling the truth in this case.

Well, you have been chosen and you have been

1253

Charge of the Court

sworn as jurors to try the case, to try the issues of fact presented by the allegations of the indictment and the denials by the not guilty plea of both these defendants. Let your verdict be without prejudice, without any bias, and without any sympathy. You are a fact-finding body and it is your duty to decide whether the acts charged in the indictment have been committed by these defendants beyond a reasonable doubt, and you are to perform this duty without fear, without bias or without prejudice to either defendants or the Government. The law does not permit jurors to be governed by fear. It does not permit jurors to be governed by sympathy. It does not permit jurors to be governed by prejudice or public opinion.

Now, in arriving at your decision you should consider the evidence again in the light of all your experiences and by the exercise of your own knowledge and your own common sense. You must not permit any plea of sympathy to enter your verdict. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as I stated the law to be, and reach a just verdict regardless of the consequences.

Charge of the Court

1254

While you must not surrender your conscientious opinion when you go into the jury room, you must not by the same token be stubborn. You must keep your mind open to reason.

So in conclusion, let me say again, it is your duty to weigh this evidence carefully, dispassionately, calmly, and to reach a conclusion about the case as to the facts which are wholly within your findings. The only question for your consideration is whether these defendants are guilty or innocent of the offenses for which they are now on trial. If you are satisfied beyond a reasonable doubt that they are guilty, it is your plain duty to convict them. If you have a reasonable doubt about the matter, it is equally your plain duty to acquit them.

Now, as I said before, you consider each defendant separately. You can find one guilty and the other innocent, as the case may be.

Now, the punishment that is provided by law is a matter which is going to be exclusively within the province of the Court. You cannot and you should not allow the consideration of any punishment which may be imposed upon any or either defendant, if found guilty, to influence you in arriving at an

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Charge of the Court

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impartial verdict as to the guilt or innocence of that defendant. It will be for the Court to determine any mitigating or any special circumstances which may require consideration in the case if the defendant is found guilty. You should not be concerned with that question of punishment.

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Now, ladies and gentlemen, all twelve of you must agree, whichever way you find. In other words, your verdict must be unanimous. You must take each count of the indictment separately and you must determine the guilt or innocence of each defendant with respect to each count, except remembering as to count four only Doris Elaine Miller is involved.

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Now, the form of your verdict should be:

We, the jury, find the defendant Eugene Welcome not guilty on count two, or

We, the jury find the defendant Eugene Welcome guilty of count two.

20

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23

You must repeat this procedure on count three, and as to Doris Elaine Miller, on count four, and return a verdict of guilty or not guilty on each count as I have outlined it to you.

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Now, if you wish any testimony of any witness to be read to you or if you want to see any exhibits

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Charge of the Court

or if you have any further questions, please send a note to the marshal who will relay your message to me.

Now, generally, we have Juror No. 1 act as the forelady and she will act as the forelady in this case. If there are any notes to be sent, she can write it out or have someone else among the jurors write it out for her.

Now, jury service is not always pleasant. I know it is not convenient, but jury service is one of the keystones of our system of American justice and democratic form of government, and I am sure all of you realize that and you ought to realize how important your job is and to some extent it is a privilege and the first privilege that a layman has to participate in the democratic form of government.

I want to thank each and every one of you for your attention and devotion as citizens to this important task.

May you in accordance with the evidence and the law, by your verdict declare the truth and proclaim the cause of justice and righteousness.

I will repeat, if you wish to examine any exhibits they will be delivered to you after you have

Charge of the Court

retired, and if you wish to be informed on a point of law arising in the case or have any part of the testimony verified, you ask to be returned to the courtroom for further instructions.

At this time it is customary to take a short recess in order that I may hear any application made by counsel. I request you not to consider this case until you have been brought back at the end of this very short recess.

Are there any applications?

MR. DiCARLO: The same exception that I had made.

THE COURT: Do you want me to send the jury out?

MR. DiCARLO: It is just the one that I made before. If we go to the sidebar it will only take a minute.

(The following transpired at sidebar.)

MR. DiCARLO: The same exception made previously, dealing with the similar subsequent act. That is all I have.

THE COURT: All right.

(The following transpired in open court.)

THE COURT: I think, ladies and gentlemen,

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Hodges-direct

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Q And what did he do at that time when he came back to the store?

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A He spoke -- well, he gave everybody a thousand dollars and --

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THE COURT: Who is everybody?

7

8

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THE WITNESS: Elaine and Gloria, all of us, Elaine, Gloria, myself and DeeDee -- well, he had the money already, so Akim --

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11

THE COURT: May we know when and where and who was present?

12

13

You say there was Elaine, Gloria, yourself. Was there anybody else that he gave a thousand dollars to?

14

DeeDee?

15

DeeDee?

16

THE WITNESS: No, I am making a mistake.

17

18

19

The thousand dollars that he was supposed to give me, he gave it to DeeDee for me, too, for me and DeeDee to share together.

20

THE COURT: So you didn't get it.

21

THE WITNESS: No.

22

THE COURT: DeeDee got a thousand dollars?

23

THE WITNESS: Yes.

24

THE COURT: Who else?

25

THE WITNESS: Akim and Elaine and Gloria.

5

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Hodges-direct.

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THE COURT: Who else?

3

THE WITNESS: Gloria.

4

THE COURT: Where was this thousand dollars
given? Where did he make this delivery?

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THE WITNESS: He came down with the money all ready
and with a rubber band, he came down to the store.

7

8

THE COURT: He came to the store?

9

THE WITNESS: Yes.

10

THE COURT: And Gloria was there?

11

THE WITNESS: Me and Gloria.

12

THE COURT: And you and Elaine were there?

13

THE WITNESS: Elaine came down. I'm not too sure.
She might have come down. I'm not too sure.

14

15

THE COURT: How do you know he gave a thousand
dollars to Elaine?

16

17

THE WITNESS: Because he called us in back, he
told us, "I am giving everybody a thousand dollars."

18

19

THE COURT: He said he is giving everybody a
thousand dollars, but then you and Gloria only were there

20

21

Was there anybody else there at this time?

22

THE WITNESS: In the store?

23

THE COURT: Yes.

24

THE WITNESS: No.

25

THE COURT: He only gave you two, that is?

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Hodges-direct

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THE WITNESS: No, he came back to the store and in the back, he called me in the back, he said, "Is it all right if I give the family a thousand dollars?"

"A thousand dollars, go ahead, it's all right.

"Well, I give Elaine a thousand dollars" --

THE COURT: he said he had given her already?

THE WITNESS: Yes, and Gloria.

THE COURT: He said, "I gave Gloria a thousand dollars"?

THE WITNESS: Right.

THE COURT: And you got a thousand dollars?

THE WITNESS: No, he said, "I give it to DeeDee."

THE COURT: He said he gave it to DeeDee?

THE WITNESS: He said he gave it to DeeDee for me.

THE COURT: DeeDee wasn't there?

THE WITNESS: Yes, he was there.

THE COURT: DeeDee was there and he gave DeeDee but he didn't give you, and he gave Gloria, and that is all that you saw money passing?

THE WITNESS: Akim had his thousand dollars.

THE COURT: How do you know?

THE WITNESS: Because he showed me.

THE COURT: Akim was there?

7 1

Hodges-direct

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THE WITNESS: Yes.

3

THE COURT: Akim got a thousand dollars?

4

THE WITNESS: Yes.

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THE COURT: The only one that wasn't there was

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Elaine?

7

Was Elaine there?

8

THE WITNESS: He gave her a thousand dollars.

9

THE COURT: But you never saw that, you never

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saw that?

11

THE WITNESS: I never seen it directly him give

12

it to her, right, no.

13

THE COURT: He said it or what?

14

THE WITNESS: He told me.

15

THE COURT: "I have already done it"?

16

THE WITNESS: Right.

17

THE COURT: All right.

18

BY MR. APPLEBY:

19

Q How much did DeWitt Owens and you get combined?

20

A \$3,000.

21

Q That was DeWitt Owens' share for his

22

participation in the bankrobbery?

23

A We got it piece by piece because we were

24

supposed to keep the kitty system, we got it piece by piece.

25

THE COURT: At least that day you only got a